

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLIFFORD LEE OLSZEWSKI,

Defendant-Appellant.

UNPUBLISHED

October 7, 2003

No. 239927

Oakland Circuit Court

LC No. 00-175681-FC

Before: Owens, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct (weapon; victim under thirteen), MCL 750.520b(1)(a) & (e); two counts of second-degree criminal sexual conduct (victim under thirteen), MCL 750.520c(1)(a); and one count of attempted first-degree criminal sexual conduct, MCL 750.92; MCL 750.520b(1)(e). Defendant was sentenced to fifteen to thirty years' imprisonment for each first-degree criminal sexual conduct conviction; five to fifteen years' imprisonment for each second-degree criminal sexual conduct conviction; and two to five years' imprisonment for the attempted first-degree criminal sexual conduct conviction. Defendant appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant contends that the trial court erred in admitting his statements to a police officer who responded to his house. Defendant contends that he was "in custody" at the time of the statements because the questioning officer's testimony suggested that he might have physically detained defendant if defendant had attempted to flee. Thus, defendant contends that the police officer's failure to give *Miranda*¹ warnings rendered his statements inadmissible.

It is well established that a police officer's "obligation to give *Miranda* warnings to an accused attaches only when the person is subject to custodial interrogation." *People v Ish*, 252 Mich App 115, 118; 652 NW2d 257 (2002). Whether a person was "in custody" for purposes of *Miranda* warnings presents a mixed question of fact and law that we answer independently after de novo review of the record. *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

(1997). The inquiry focuses on whether, under the totality of the circumstances, the defendant would have reasonably believed that he was free to leave. *Id.* at 382-383.

In *Ish*, a police officer found the defendant in the complainant's family room watching television. *Ish, supra* at 117. A window screen had been ripped out and a window was removed. *Id.* The police officer questioned the defendant about his presence in the room and the defendant made incriminating statements. *Id.* at 118. We opined that *Miranda* warnings were not required because the "defendant was not under arrest or in a police-dominated, coercive atmosphere as intended by *Miranda*." *Id.* We noted that "a police officer may ask general on-the-scene questions to investigate the facts surrounding the crime without implicating the holding in *Miranda*." *Id.*

Here, defendant was sitting alone on his porch when the questioning officer arrived. Although two other police officers were present, they were inside talking to defendant's wife. These officers had obviously allowed defendant to go outside unsupervised to smoke a cigarette. Thus, it is not clear that this was a "police dominated" atmosphere.

Further, the questioning officer's questions revealed that he was not aware of defendant's wife's specific allegations and that he was, instead, merely trying to determine the reason that the police were called to defendant's home. Thus, although the police officer speculated that he might have attempted to physically detain if defendant had tried to flee, there was no basis for defendant to suspect that the questioning officer would have done so. Therefore, at that point in time, under the totality of the circumstances, defendant would not have reasonably believed that the questioning officer would have prevented him from leaving. *Mendez, supra* at 382.

Defendant also contends that his statements were involuntary because he was intoxicated and surrounded by police officers. However, because defendant did not raise this issue below it is forfeited. Defendant is not entitled to relief unless he can show a plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999).

Generally, in determining whether a statement was voluntary, we review the entire record and make an independent determination. *People v Wells*, 238 Mich App 383, 386; 605 NW2d 374 (1999). In *Wells*, we noted the factors that may be relevant to this determination:

[T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Id.* at 387.]

The presence or absence of any of these factors is not, however, conclusive on the issue of voluntariness. *Id.*

Here, defendant contends that his statement was involuntary because he was intoxicated. Although the questioning officer testified that defendant smelled like alcohol, his testimony also suggested that defendant's behavior did not appear consistent with someone who was intoxicated. For example, defendant's statements were not slurred and he answered the questions appropriately. In fact, we note that defendant's statements, if untrue, suggest that he was certainly coherent enough to fabricate a somewhat exculpatory explanation for his conduct.

Defendant further notes that there were numerous police officers present. But the record indicates that there were only four officers present—two inside talking to defendant's wife and two (presumably the questioning officer's partner was present) talking to defendant outside. Again, given the questioning officer's testimony that defendant was smoking a cigarette alone on the porch, the two police officers inside the house did not prevent defendant from going outside.

Moreover, defendant does not contend that his age, education, intelligence, or overall health rendered his statements involuntary. There is absolutely no evidence indicating that defendant was threatened, abused, or unnecessarily delayed, nor is there evidence that defendant was deprived of food, sleep, or medical attention. There is no basis for a conclusion that defendant's lack of experience with the police rendered his statements involuntary. Thus, under the totality of the circumstances, it is not plainly apparent that defendant's statement was involuntary; therefore, defendant may not avoid forfeiture of this issue.² *Carines, supra*.

Finally, defendant takes exception to the following statement by the prosecutor to the jury panel:

And I also want to ask this jury panel, you all heard of the fact that this—the case that the jurors are seated in this trial—for this trial, they will hear involves an allegation of sexual contact between the Defendant and a five-year-old. The Judge read you—or the Court read you the six charges that are compiled in the complaint against Mr. Olszewski. And I want to tell you that there are additional allegations that he had unlawful sexual contact with his wife on the same night. Is there anyone because of those facts and because that additional fact being added in there and considered would not be able to be fair and impartial in sitting in this case?

On appeal, defendant contends that the prosecution improperly suggested that there were uncharged allegations that defendant had unlawful sexual contact with his wife on the same night. Defendant contends that there was no evidence of any unlawful conduct that went uncharged and that the comments were prejudicial.

² Defendant also contends that the trial court was required to hold a hearing outside of the presence of the jury to determine the voluntariness issue. But defendant did not request a hearing or even specifically contend that he his statements were involuntary. Thus, his contention that he was entitled to a hearing is forfeited. *Carines, supra*. Having rejected defendant's contention that his statements were involuntary, we are not persuaded that the trial court's failure to hold a hearing affected defendant's substantial rights. *Id.* Accordingly, defendant may not avoid forfeiture of this issue. *Id.*

Defendant concedes that he did not object below. Accordingly, this issue is, again, reviewed for plain error. *Carines, supra*. Here, although inartfully phrased, the prosecutor's question was posed to the jury to determine whether the charges that defendant engaged in improper conduct with his stepdaughter would prevent any juror from impartially considering whether defendant engaged in the improper conduct with his wife. Obviously, if a juror cannot impartially consider all of the charges against a defendant, he or she should not serve on the jury. It was certainly reasonable for the prosecutor to question whether the potential jurors could remain impartial in light of these particular allegations. Thus, although the prosecutor's question could have been clearer, we are not persuaded that the question was prejudicial or plainly erroneous. Therefore, defendant may not avoid forfeiture of this issue. *Id.*

Affirmed.

/s/ Donald S. Owens
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter